

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of )

MOBILEMEDIA CORPORATION, et al. )

Applicant for Authorizations and Licensee of )  
Certain Stations in Various Services )

WT Docket No. 97-115

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**PETITION OF JOHN M. KEALEY FOR RECONSIDERATION  
AND MODIFICATION OR CLARIFICATION OF THE  
COMMISSION ORDER OF AUGUST 8, 1997**

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## **SUMMARY**

John M. Kealey ("Kealey"), by his attorneys, hereby moves the Federal Communications Commission ("FCC" or "Commission"), pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106, to reconsider its Order, FCC 97-284, released August 8, 1997, in WT Docket No. 97-115 ("August 8 Order"), and either (1) modify the August 8 Order by removing Kealey from the list of individuals whose qualifications to hold an FCC license are in question, or (2) clarify the August 8 Order by defining a procedure by which Kealey may proffer information relevant to his qualifications, for example, by granting a limited waiver of paragraph 8 and an expedited qualifications hearing pursuant to 47 C.F.R. §§ 1.3 and 1.41.

The existence of a dispute about whether Kealey knew of the misconduct MobileMedia voluntarily disclosed to the Commission does not merit the devastating stigma that has attached to him as a result of the August 8 Order. The allegations that Kealey knew about the false filings are no more certain or credible than those made against individuals who, without the benefit of any fact-finding, were removed from the list by the August 8 Order. Differences in the degree of knowledge alleged in equally uncertain allegations do not justify differential treatment nor the far greater discrepancy between release from the list and the disastrous result that flows from remaining on a list of "potential wrongdoers" that has been whittled from 91 to 4. Accordingly, the Commission should modify the August 8 Order to remove Kealey from the list of individuals whose qualifications are in question.

Alternatively, the Commission should clarify the August 8 Order to include a procedure by which Kealey can clear his name, regardless of the MobileMedia stay or the outcome of Second

Thursday relief, and without the prerequisite of an application or attributable interest. Otherwise, Kealey may forever remain on the short “blacklist” publicly disseminated by the August 8 Order.

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**I. BACKGROUND**

As a result of several successful and unblemished years in the paging industry, Kealey was named the Chief Operating Officer and President of MobileMedia Corporation ("MobileMedia" or the "Company") in December 1993. (Declaration of John M. Kealey ("Kealey Decl."), attached hereto as Exhibit A, ¶ 1). His responsibilities included sales and marketing development, operational

oversight of customer service, credit collection, management information systems, accounting and inventory, maintenance and construction of network facilities, and the acquisition and raising of capital. (Id. ¶ 2). During his tenure, MobileMedia enjoyed extraordinary growth and became the second largest paging company in the United States, serving approximately 4.4 million paging customers. (Id. ¶ 1). Concerns later developed about the financial health of MobileMedia in the aftermath of its acquisition of two other paging companies. Despite its successes in the commercial market, confidence was lost in the ability of the Company's management team to develop and maintain an equally thriving consumer customer base. As a result, Kealey and other senior officers were constructively terminated in July 1996. (Id.).

Kealey did not have substantive oversight responsibility for regulatory matters, including compliance.<sup>1</sup> (Id. ¶ 2). Rather, that responsibility resided with MobileMedia's Regulatory Counsel's Office. (Id.). As a consequence, Kealey did not become aware that MobileMedia had improperly filed Forms 489 with the FCC until September 24, 1996, when he was contacted by a law firm ("Outside Counsel") which had been retained by the Company to investigate the wrongdoing and report its findings to the Wireless Telecommunications Bureau (the "Bureau"). (Id. ¶ 3). Outside Counsel interviewed Kealey by telephone the following day, informing him that (1) MobileMedia's Regulatory Counsel ("Regulatory Counsel") had admitted responsibility both for conceiving the plan to file false applications and for actually preparing, certifying, and filing the applications;

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<sup>1</sup> Although the company's organizational chart reflects that Regulatory Counsel reported to General Counsel, and General Counsel in turn reported to Kealey and other senior officials, General Counsel did not report to Kealey, nor did Kealey have any supervisory responsibilities over that officer. Kealey generally was not involved in the activities of the Legal or Regulatory organizations. (Kealey Decl., ¶ 2).

(2) Regulatory Counsel claimed to have received at least the tacit approval of the Company's General Counsel ("General Counsel"); (3) Regulatory Counsel recalled that he had made Kealey aware of the false filings in a passing conversation; and (4) General Counsel believed Regulatory Counsel's recollection to be accurate. (Id. ¶ 4). Kealey denied any knowledge of the Company's inaccurate filings. He explained that because he had no substantive oversight responsibility for regulatory matters, he had no reason to be and was not aware that false applications had been filed. (Id. ¶ 5). He told Outside Counsel that, had he known about the false filings, he would have prevented Regulatory Counsel from filing them. (Id.).

Outside Counsel concluded its investigation the following month and submitted a report of its findings (the "Report") to the Bureau on October 16, 1996. The Report found that Regulatory Counsel was "at the center of the problem." The Report stated that the investigation had revealed "no evidence suggesting that inaccurate filings made *prior to* 1996 were known to members of the Company's management outside of the Regulatory Counsel's Office" (emphasis added). Regarding Kealey's involvement with false filings made *during* 1996, the Report acknowledged the existence of "conflicting accounts"<sup>2</sup> and concluded that "certainty regarding the extent of [Kealey's] knowledge and acquiescence and/or approval" was unnecessary because Kealey had been terminated as a Company employee "due to poor performance unrelated to the disclosure of the Forms 489 issue." Finally, regarding others' involvement with the filings falsely made *during* 1996, the Report

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<sup>2</sup> The Report suggested that, in addition to Regulatory Counsel, a lower level employee remembered having an informal conversation with Kealey about the propriety of the inaccurate filings. Kealey remembers having many hallway discussions with employees about various issues, but never one with anyone about inaccurate filings. He knows that, had he understood a lower level employee to have communicated a concern that revealed the existence of any impropriety, he would have investigated further and prevented its occurrence. (Kealey Decl., ¶ 6).

concluded that "none of the members of senior management involved in the derelictions — either directly or as a matter of responsibility — remained employed by the Company."

The Bureau then began its own investigation. Almost six months later, on April 8, 1997, the Commission instituted this proceeding and designated an administrative hearing on the qualifications of the Company to hold paging licenses. See MobileMedia Corporation, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 97-124, released April 8, 1997 ("HDO"). In the HDO, the Commission questioned whether "MobileMedia was entirely forthcoming" in its Report and concluded that:

despite the Bureau's investigation and certain admissions by MobileMedia, including that certain former members of MobileMedia's senior management were actively involved in the misbehavior, *it remains unclear which other officers, directors and senior managers knew about or condoned the wide-scale pattern of misbehavior.*

(HDO, ¶ 10) (emphasis added). The Commission therefore directed an administrative law judge to, on an expedited basis, take evidence and develop a full factual record on issues concerning the Company's improper filings. The hearing was scheduled to commence on June 10, 1997.

Hoping to correct the erroneous allegations made about him in the Report, Kealey cooperated with a request of the Bureau and on May 20, 1997 traveled to Washington, D.C. at his own expense to participate in an informal interview regarding the facts and circumstances surrounding the wrongdoing. Based on that cooperation and the information he provided, the Bureau subpoenaed Kealey to testify at the hearing. (Kealey Decl., ¶ 7).

On June 6, 1997, the Commission released an Order, FCC 97-197 (the "June 6 Order"), granting the Company's motion to stay the administrative hearing for a period of ten months to allow it to resolve a pending proceeding before the United States Bankruptcy Court in a manner consistent



with Second Thursday Corporation, 22 F.C.C.2d 515 (1970). The Commission conditioned the stay on MobileMedia's fulfillment of its agreement to file monthly status reports and on "there being no sales of MobileMedia stock by MobileMedia's officers and directors." (June 6 Order, ¶ 1). In addition, the Commission warned that the magnitude of the false filings at issue warranted heightened scrutiny to ensure compliance with the Second Thursday showing with respect to all "potential wrongdoers." (Id. ¶ 17). The Commission defined "potential wrongdoers" as "all former and current officers, directors, and senior managers" of MobileMedia and directed the Bureau to prepare and disseminate a list "of all such persons." (Id. ¶¶ 17, 18). Although the qualifications of all of the listed individuals were placed in question, the Commission provided only one mechanism by which they could be resolved, if necessary, during the pendency of the stay: it directed all FCC bureaus processing applications in which a listed individual holds an "attributable interest" to make a recommendation to the Commission as to the basic qualifications of that individual, with the ultimate qualifications resolution to be made by the Commission itself. (Id. ¶ 18). However, the procedures by which the affected individuals were to proffer information relevant to his or her qualifications were left undefined, and no procedure was implemented for the resolution of the qualifications of those who did not hold any attributable interest.

In response to the directive contained in the June 6 Order, the Bureau submitted a list of 91 "potential wrongdoers" on June 16, 1997. On June 25, 1997, the Bureau substituted a revised and corrected list naming only 43 individuals (the "Amended List"). Thereafter, six petitions for reconsideration or clarification of the June 6 Order were filed which challenged the list of potential wrongdoers as overbroad and urged the Commission to correct its June 6 Order to implement a

practical and timely procedure by which a determination could be made as to whether the listed individuals were in fact "wrongdoers."

In a subsequent order -- the August 8 Order which is the subject of this motion -- the Commission conceded that the petitioners' views "essentially parallel[ed] [its] own in material respects." (August 8 Order, ¶ 5). However, the Commission did not correct the procedural deficiency of its June 6 Order. Instead, the Commission retreated from its earlier position that the results of the Company's internal investigation and the Bureau's own investigation reflected uncertainty as to which "officers, directors and senior managers knew about or condoned the wide-scale pattern of misbehavior." After reexamining only the "information before [it] at the time of designation," but without taking any additional evidence or developing the full factual record it conceded was lacking at the time of the HDO, the Commission expressed certainty that "the allegations against MobileMedia [we]re sufficient to raise questions only as to the qualifications of four individuals" and removed the other 39 individuals from the Amended List (August 8 Order, ¶ 8).

Of those 39, the Commission made findings only as to three, concluding that, despite "some degree of knowledge of the wrongdoing," their activities did not raise a "substantial and material question concerning their qualifications to be a licensee." (August 8 Order, ¶ 9). Although it was recognized that some of the other 36 individuals knew of the wrongdoing, all 36 were simply removed from the Amended List, seemingly in contradiction to the heightened scrutiny the Commission had warned of in its June 6 Order. As for Kealey, despite acknowledgment of the existence of an "unresolved dispute" as to his knowledge and involvement, if any, in the wrongdoing, he remains on a short list of "potential wrongdoers" which includes the two individuals

who were fired for being "primarily responsible for carrying out the deception of the Commission." (August 8 Order, ¶ 8).

Although the August 8 Order effectively targeted Kealey, it neglected to provide him with a meaningful mechanism by which his qualifications could be resolved. Although Kealey had informed the Bureau on July 11, 1997<sup>3</sup> that he currently holds no FCC license or application nor has an attributable interest in any other licensee or applicant, the Commission simply reiterated in its August 8 Order that "no application in which [Kealey] has an attributable interest may be granted until the qualifications question has been resolved in that or the MobileMedia proceeding." (August 8 Order, ¶ 8). In so doing, the Commission overlooked the possibility that the qualifications question as to Kealey might never be resolved if the Company proceeds successfully under Second Thursday. Meanwhile, Kealey, who stands ready to proffer his qualifications upon notification by the Commission of its formulation of a suitable procedure, remains on a public register of "potential wrongdoers" which, after having been whittled down from 91 to 43 to 4 without any specific fact-based finding, has effectively become a list of "wrongdoers."

## **II. ARGUMENT**

### **A. THE COMMISSION SHOULD MODIFY THE AUGUST 8 ORDER TO REMOVE KEALEY FROM THE LIST OF INDIVIDUALS WHOSE QUALIFICATIONS ARE IN QUESTION.**

The August 8 Order has directly impaired Kealey's ability to earn a livelihood in the telecommunications industry. Without collecting any additional evidence or conducting any further

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<sup>3</sup> On June 27, 1997, the Bureau directed MobileMedia to provide certain information with respect to the 43 individuals named on the list so that the Bureau could expeditiously identify applications in which those persons held attributable interests.

fact-finding, the Commission by its August 8 Order removed reservation as to 95% of those originally identified as potentially responsible for the wrongdoing. By going no further in the August 8 Order to dispel -- or establish a viable procedure to dispel -- the stigma now attached to the remaining 5% which includes Kealey, the implication to the industry is that Kealey has already been found to have engaged in wrongdoing. In casting that cloud, however inadvertently, the August 8 Order has severely injured Kealey's professional reputation and eliminated any practical prospect for Kealey to obtain another job in the industry to which he has devoted the past decade of his professional life. (See Kealey Decl., ¶ 8).

The record does not justify the shadow cast upon Kealey. During its investigation, the Bureau found that the filing of false Forms 489 began in the third quarter of 1993. (HDO, ¶ 5). Outside Counsel's Report was careful to point out that there was no evidence that the existence of inaccurate filings made prior to 1996 was known to any MobileMedia management — including Kealey — outside of Regulatory Counsel's Office. Regulatory Counsel claimed that in early 1996 he had made Kealey aware of the inaccurate filings in a passing conversation, the details and timing of which he could not remember. General Counsel did not independently corroborate this statement, but rather expressed his "belief" that Regulatory Counsel's recollection was accurate. Kealey knows Regulatory Counsel never communicated that false forms had been filed with the Commission. (Kealey Decl. ¶ 5).

Although the August 8 Order does not resolve the conflict, by publicly singling out Kealey and placing his qualifications in limbo, it gives substance to the versions recounted by the admitted wrongdoers, whose credibility after the filing of hundreds of false Forms 489 is surely suspect. Equally suspect is the notion that revelation to Kealey of the wrongdoing would occur informally

in a passing conversation. With no oversight responsibility over regulatory matters, Kealey was simply never made aware of the false filings. (Id. ¶¶ 2,3,5 ). Rather, Kealey relied on the Company's counsel to fulfill their responsibility and ensure that all Forms submitted to the Commission, 489 or otherwise, were truthful and complied with the law. (Id. ¶ 5). The Commission has long held that good faith reliance upon counsel, as Kealey did here, protects one from disqualification. Asheboro Broadcasting Co., 20 F.C.C.2d 1 (1969); accord Wadeco, Inc. v. FCC, 628 F.2d 122, 128 (D.C. Cir. 1980).

The allegations that Kealey knew about the false filings are no more certain than those made against other individuals, including current officers of MobileMedia, who were removed from the Amended List by the August 8 Order. In Kealey's case, there is an acknowledged dispute about whether he knew about the wrongdoing. To several current officers of MobileMedia who were released from the Amended List, the August 8 Order attributes "some degree of knowledge." (August 8 Order, ¶ 9). Differences in the degree of knowledge alleged in equally uncertain allegations does not justify differential treatment nor the far greater discrepancy between release from the list and the disastrous result that flows from remaining on a list of "potential wrongdoers" that has been whittled from 91 to 4.

Accordingly, Kealey respectfully requests that the Commission reconsider that aspect of its August 8 Order that pertains to him and modify the Order to similarly remove him from the list of persons whose qualifications remain in doubt.

**B. ALTERNATIVELY, THE COMMISSION SHOULD CLARIFY THE AUGUST 8 ORDER TO INCLUDE A PROCEDURE BY WHICH KEALEY CAN CLEAR HIS NAME, REGARDLESS OF THE MOBILEMEDIA STAY OR THE OUTCOME OF SECOND THURSDAY RELIEF, AND WITHOUT THE PREREQUISITE OF AN APPLICATION OR ATTRIBUTABLE INTEREST.**

Without the relief requested herein, it is likely that Kealey will forever remain on the short "blacklist" publicly disseminated by the August 8 Order. That is because several very important facts which Kealey had disclosed to the Bureau back in early July 1997 render ineffectual the mechanisms the August 8 Order purportedly provides Kealey to clear his name.

The August 8 Order indicates that Kealey may resolve his qualifications at the originally designated administrative hearing to be held in April 1998 in the event Second Thursday relief is denied. (August 8 Order, ¶ 8). First, Second Thursday relief may well be granted, eliminating this mechanism entirely. Second, Kealey is no longer an officer of MobileMedia nor holds MobileMedia stock of any real value. Coupled with the fact that the Commission, by its August 8 Order, removed every current MobileMedia officer, director, and senior manager from the "potential wrongdoer" list, it is unlikely that in April 1998 an administrative law judge, whose only task is to determine whether MobileMedia continues to qualify as an FCC licensee, would actually address and resolve Kealey's qualifications as well.

The August 8 Order also provides that Kealey may resolve the qualifications question in the context of an application in which Kealey has an attributable interest. However, Kealey is not an FCC licensee or applicant, nor holds an attributable interest in any licensee or applicant, and, as discussed above, it is unlikely that Kealey will ever have such an interest in any telecommunications company in the shadow of the August 8 Order.

Thus, under the Commission's August 8 Order, there exists no effective procedure by which Kealey can clear his name. In this regard, the August 8 Order violates constitutional due process. Procedural due process imposes constraints on government decisions which deprive individuals of "liberty" interests within the meaning of the due process component of the Equal Protection Clause of the Fifth Amendment. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). According to the Supreme Court, the concept of "liberty" encompasses the right of the individual to contract, to engage in the common occupations of life, to acquire useful knowledge, and generally to enjoy those privileges "long recognized essential to the orderly pursuit of happiness by free men." Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).<sup>4</sup> Indeed, the right to follow a chosen trade or profession is a constitutionally protected liberty interest. Karseva v. Department of State, 37 F.3d 1524, 1528-29 (D.C. Cir. 1994); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). Moreover, "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [due process] clause must be satisfied." Goss v. Lopez, 419 U.S. 565, 574 (1974).

Although the due process clause dictates no single model of procedural fairness, courts generally require the government to give a party the opportunity to be heard at a meaningful time and in a meaningful manner before depriving it of a protected interest. Kremer v. Chemical Construction Corp., 456 U.S. 461, 4893 (1982); Mathews, 424 U.S. at 333; Cafeteria Workers, 367

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<sup>4</sup> It is the nature of the interest, not its weight, that determines if the due process requirements apply. Board of Regents 408 U.S. at 571; Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

U.S. at 895. In evaluating the adequacy of available procedures, courts balance the following factors:

- (1) the privacy interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
- (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Gilbert v. Homar, 65 U.S.L.W. 4442, 4444 (U.S. 1997); Brock v. Roadway Express, 481 U.S. 252, 261 (1987); Mathews, 424 U.S. at 335. See also Old Dominion Dairy Products v. Secretary of Defense, 631 F.2d 953, 967 (D.C. Cir. 1980).

The Commission's August 8 Order has the unintended but actual effect of interfering with Kealey's reputation and depriving him of employment within the telecommunications industry. These interests are liberty interests entitled to due process protection. Despite the Commission's significant interest in protecting the public from unqualified paging licensees, the two procedures set forth in the August 8 Order have erroneously deprived Kealey of any meaningful opportunity to be heard. An additional procedure or an expedited qualifications hearing will cure the August 8 Order's constitutional deficiencies without significant fiscal or administrative burden to the Commission.

Accordingly, Kealey respectfully submits that the Commission should reconsider and clarify its August 8 Order to provide a mechanism by which Kealey's qualifications may be determined, regardless of MobileMedia's stay or the outcome of Second Thursday relief, and without the prerequisite of application or attributable interest. In this regard, Kealey requests the Commission



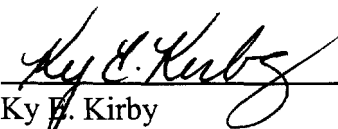
consider, pursuant to 47 C.F.R. § 1.3 and 1.41, waiving paragraph 8 of the August 8 Order and, on an expedited basis, designating a hearing to allow Kealey to show directly to the Commission that he is fully qualified to hold FCC licenses.

### III. CONCLUSION

For the reasons set forth above, Kealey requests that the Commission reconsider the August 8 Order and either (1) modify it to remove Kealey from the list of those persons whose qualifications remain in question, or (2) clarify it to define a procedure by which Kealey may proffer information relevant to his qualifications to hold FCC licenses, for example, by granting a limited waiver of paragraph 8 of the August 8 Order and an expedited qualifications hearing to allow Kealey to show directly to the Commission that he is fully qualified to hold FCC licenses.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of September, 1997, a true and correct copy of the foregoing Petition of John M. Kealey for Reconsideration And Modification or Clarification of the Commission Order of August 8, 1997 was served via U.S. Mail, postage prepaid on the following persons:

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